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NO. 93-82

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

- -

REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.

Petitioners

vs.

AVERELL SMITH, et al.

Respondents

- -

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

- -

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INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for certiorari herein is highly misleading.

First, it is contended that this case only involves a challenge to "content-neutral" use of mandatory student fees to fund political and ideological activi-

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1. In their listing of parties, petitioners fail to mention respondent Marina

ties, and that respondents did not challenge alleged finding of "content-neutrality" before the California Supreme Court. Cert.Pet., 4. This is most untrue: As will be shown, post, the involuntary financing of political and ideological advocacy imposed by the University in this case is not content-neutral. Moreover, said lack of content-neutrality was repeatedly argued before the lower courts. See e.g. Brief On The Merits By Appellants Thomas Kistler and Emily Taylor, 26-18; Reply Brief On The Merits By Appellants Thomas Kistler and Emily Taylor, 8-18; Opposition To Petitions For Rehearing (Kistler and Taylor), 4-11.

Secondly, it is claimed that the political activities of ASUC, its lobbies and funded groups have somehow been

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fn. 1 (Cont'd.)

Trepetin and have served no papers on her counsel, Philip A. Larrabee.

restricted to "University-related" or "student-related" issues. Even assuming this distinction made a difference (respondents content, and the California Supreme Court found, it does not), the involuntarily-funded political and ideological advocacy has not been so limited. It has included support for ballot measures opposing draft registration, toughening water quality standards , and creating a split-roll system of property taxation, favoring election to office of certain candidates (e.g. Congressman Ronald Dellums and the left-leaning April Coalition/Berkeley Citizens Action faction in local elections) and opposing the election of others (e.g. President Reagan and former California Lieutenant Governor John Harmer), and support for causes such as gay and lesbian rights, opposition to restrictions on abortions, advocacy of

ratification of the ERA, gun control, the union position in numerous labor disputes (e.g. various UFW strikes and boycotts) and divestiture from South Africa.

The alleged "conflict" between the Second Circuit's decision in Carroll v. Blinken (2nd Cir. 1992) 957 F.2d 991 and the state court decision herein is not a "black and white" difference demanding reconciliation by this Court. On the contrary, while purporting to approve of much of the Carroll court's reasoning, petitioners ask this court to overturn the conclusions of both the Carroll and all seven justices of the California Supreme Court herein (including even the two dissenters) that a university cannot compel students to involuntarily fund off-campus lobbying activities.

There is not reason for this Court to review the well-reasoned decision of

the California Supreme Court in this matter.

REASONS FOR DENYING THE WRIT

I. THE UNIVERSITY'S ACTIONS TO COMPEL STUDENTS TO INVOLUTARILY FUND POLITICAL AND IDEOLOGICAL ADVOCACY BY ASUC, ASUC LOBBIES, AND ASUC-FUNDED GROUPS CANNOT BE DEFENDED AS FUNDING OF A "PUBLIC FORUM"

Petitioners' claim that the Universityonly compels students to fund a "public forum' which is "content neutral" finds no support in the record and is legally untenable.

A. ASUC AND ITS FUNDED LOBBIES ARE NOT "CONTENT NEUTRAL" FORA, BUT PARTISAN ADVOCATES OF PARTICULAR VIEWPOINTS

Petitioners' use of a "forum" argument to defend ASUC's funding of its <u>own</u> political activities and lobbies is somewhat surprising: Surprising because ASUC and its lobbies are <u>not</u> ideologic-

ally neutral.

ASUC itself regularly takes and advocates positions on legislation and other political and ideological matters, through resolutions of its senate, adoption of ASUC referenda, and otherwise. A few of the positions so taken have included support for the causes of gay and lesbian rights, divestment from South Africa, ratification of the ERA, gun control, and various labor strikes and boycotts (e.g. UFW and Nestle boycotts), and opposition to draft registration, hunting of harp seals, and most of the key policies of the last two Republican Administrations in Washington. See e.g. Trial Exhibits 253A, 253B, 254; Appellants' Appendix (A.A.) 802-814, 1055-1056, 1072-1076.

ASUC systematically promotes its political stances through three groups of

lobbies: in Washington, D.C., Sacramento, and Berkeley,[2] and funding of ASUC-controlled operations groups" such as the Draft Counseling Center, Renters Assistance Project, and various "voter registration" drives. These lobbies and operations groups regularly advocate political stances. Some examples have included support for divestment from South Africa, opposition to transit funding cuts, support for laws requiring payment of interest on tenant security deposits, support for a press shield amendment to the California Constitution, support for laws requiring modification of existing buildings for the disabled, opposition to draft registration, support for decriminalization of marijuana, support for

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2. Opposing counsel fail to note ASUC operates the ASUC National Student Lobby, formerly United States Student Association Berkeley Annex, to lobby Congress. Reporters' Transcript (R.T.) 401-406

legalizing in-law apartments, opposition to condominium conversions, opposition to rent increases for rent-controlled units, and opposition to approval of a pinball parlor.[3] See e.g. Trial Exhibits 107-129, 159-160, 167-173, 179-183, 198-199, 214-216, 218, 239-250; A.A. 723-730, 979-980, 990-1000; RT 401-406, 424-441, 464-477.

ASUC has also participated in or assisted litigation designed to achieve policy objectives supported by ASUC, such as challenging the validity of California's vagrancy laws, and the recall of leftist Berkeley City Councilmember D'Army Bailey. See AA 880; Trial Exhibits 253A, 253B, 254.

ASUC political activities have been far from "nonpartisan," let alone "non-political," but have included excursions

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3. The lobbies have thus "lobbied on a wide range of issue, many of which are totally unrelated to the university or its students," (Cert.Pet. 29, fn. 23).

into electoral politics. These have included support for election of Congressman Dellums, Mervyn Dymally for Lieutenant Governor, and April Coalition/ Berkeley Citizens Action candidates for local office, opposition to election of President Reagan, and support for ballot measures to enact rent controls, divest from South Africa, oppose draft registration, create a split-roll property tax system, and support a nuclear freeze.[4] RT 22-32, 172, 210, 221, 226-227, 238-255, 296-303, 376, 377, 404, 427-434, 464-467, 472, 530-539, 654, 662-663, 665, 673, 679-680, 775-781, 890-891, 973-991, 1112,

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fn. 3 (Cont'd.)

No prinicpled distinction can be made between this case and Carroll on said point.

4. The Student Lobby did endorse the Nuclear Freeze Initiative. RT 377. And the Municipal Lobby did support a divestment initiative (the so-called "Responsible Investment Ordinance"). A.A. 727, 979-980.

1118-1128, 1288; A.A. 667, 712-713, 727, 788, 797, 803-814, 903-904, 979-980; Trial Exhibits 137-144, 152, 173, 175, 179-180, 183, 191-197, 212, 214, 219, 223, 224, 229-236, 244, 245, 253A, 153B, 254, 2nd O - 7.

In utilizing the mandatory fee to promots ASUC's own ideological and political positions, ASUC certainly does not provide a "forum" for competing viewpoints. The ASUC lobbies do not lobby both for and against the same bill! The ASUC Renters Assistance Project does not simutaneously urder the Berkeley Rent Control Board to vote for both higher and lower rent increases! ASUC did not simultaneously both support and oppose the nuclear freeze and South Africa divestment initiatives!

Rather, as with labor union and bar association political and ideological activities that this Court has held

may not be financed out of compulsory fees (see Abood v. Detroit Board of Education (1977) 431 U.S. 209 and Keller v. State Bar of California (1990) 496 U.S. 1) compelled funding of political and ideological advocacy by ASUC, its lobbies and operations groups is not (arguably) permissible funding of a "public forum," but illegitimate mandatory funding of a particular viewpoint.

That such advocacy cannot be subsidized by State-compelled funding is plainly established by this Court's decisions in Lehnert v. Ferris Faculty Association (1991) __U.S.__ /114 L.Ed.2d 572/ and Pacific Gas and Electric ("PG&E") v. California Public Utilities Commission (1986) 475 U.S. 1, 14-15, 20.

ASUC's "lobbying and electoral speech is likely to concern topics about which individuals hold strong personal views." Lehnert, supra, at p. 595. "By

utilizing /students'/ funds for political lobbying and to garner support of the public in its endeavors, /ASUC/ would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.' The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion." Ibid. Indeed, even the non-electoral advocacy of ASUC on topics such as gay and lesbian rights, abortion, and gun control has been far more controversial in nature than a union's expenditures to enhance the reputation of the teaching profession, which this Court held, in Lehnert, are non-chargeable to dissenting members as "speech of a political nature in a public forum." Id., at p. 596.

The reasoning employed by this Court in PG&E, supra, 475 U.S. 1, to

invalidate an agency order compelling a public utility to use its billing envelopes to disseminate the positions of a ratepayer group that normally opposes PG&E in regulatory matters, transfers easily to this case: "/A student/ does not . . . have the right to be free from vigorous debate. But /he or she/ does have the right to be free from government restrictions that abridge /his or her/ own rights in order to 'enhance the relative voice' of /political/ opponents. . . . The /mandatory ASUC fee/ requires /dissenting students/ to assist in disseminating /ASUC's/ views; it does not equally constrain both sides of the debate about /many political and ideological matters on which ASUC advocates positions/ . . . Unlike . . . permissible government subsidies of speech, the /mandatory ASUC fee/ identifies a favored speaker . . . and forces the speaker's opponent/s/ - not the taxpaying

public - to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of /dissenting students/." Id., at pp. 14-15. Any "State/ / interest in promoting speech by making a variety of views available to /students/" "is not furthered by /a compulsory subsidy to ASUC's political and ideological activities/ that is not content-neutral. Moreover, the means chosen to advance variety tend to inhibit expression of /dissenting students'/ views in order to promote /ASUC's/. . . . It follows that the /mandatory ASUC fee/ is not a narrowly tailored means of furthering this interest." PG&E, supra, at p. 20.

To the extent the mandatory ASUC fee is utilized to fund ASUC's advocacy of its political and ideological views no "forum" is involved, and this case is directly controlled by Abood and Keller. Indeed,

with respect to off-campus lobbying such as is practiced by the ASUC Washington, Sacramento and Berkeley lobbies, every court to consider the question, including Carroll and the dissenting members of the California Supreme Court in this case, has agreed.

B. ASUC DOES NOT OPERATE AS A "CONTENT NEUTRAL" FORUM IN DISTRIBUTING FUNDS TO NON-ASUC ORGANIZATIONS

Petitioners' "forum" argument must fail with respect to use of the mandatory ASUC fee to fund political and ideological advocacy by non-ASUC organizations for the same reasons as it falls short with respect to funding of ASUC's activities: lack of content neutrality.

In view of ASUC's own advocacy positions with respect to a broad range of political and ideological questions, it is not surprising that ASUC's funding of outside organizations has been markedly one-sided. Almost every group funded by ASUC

with any position on such matters has views congruent with those of ASUC on such matters as opposing nuclear power, supporting gay and lesbian rights, supporting the ERA, opposing draft registration, supporting rent control, opposing the death penalty, supporting the leftist Berkeley Citizens Action faction in local elections, and re-election of certain Democratic legislators, opposing key Reagan/Bush policies, and opposing tax reduction measures. See e.g. Trial Exhibits 137-139, 140, 145-150, 153-161, 163-165, 174-178, 183-184, 196-197, 201, 212, 214, 232-235, 245, 253A, 253B, 254; RT 238-255, 260, 272-287, 290-303, 304-326, 331-345, 346-353, 376-377, 455-463, 510-520, 521-528, 548-550, 654, 765-775, 1112, 1118-1121; A.A. 797-800, 883-884.[5]

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5. The claim that respondents objected to funding of only "fourteen groups" is belied by the record and is derived

To the extent groups that have opposing viewpoints have been funded at all, it has been at disproportionately low levels. For example in 1981, Berkeley Right to Life received but $100, while pro-abortion groups California Abortion Rights Action League, Berkeley Feminist Alliance, and Campus N.O.W. received some $3300 from ASUC. See Appendix, 455-457. And it was shown at trial that one conservative group which submitted a proper application was denied all ASUC funding whatsoever. RT 651-653, Exhibit 204.

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fn. 5 (Cont'd.)

from an oversimplified statement of respondents' position appearing in the lower court opinion. In fact, respondents objected to funding of over fifty political/ideological advocacy organizations by ASUC. A few of those not mentioned in the certiorari petition included People's Anti-Nuclear Collective, Young Socialist Alliance, Young Social Democrats, Revolutionary Student Youth Brigade, International Socialists, SANE, MEChA, United Farm Workers, Berkeley

This one-sidedness in ASUC funding is inevitable, given that ASUC enforces ideological conformity on the part of funded groups by making adherence to ASUC political boycott policies (e.g. UFW boycotts, Coors boycott, South Africa divestment) a condition for funding. Trial Exhibit 2nd K (3/11/82), 253, 254.

However, "it is unnecessary for respondents to prove any instances of actual past content-based discrimination in order to establish that the ASUC fee is not a "content-neutral" public forum. U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory (1984) 154 Cal.App.3d 1157, 1171.

It is settled First Amendment jurisprudence that access to a would-be "forum"

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fn. 5 (cont'd.)

Anti-Draft Alliance, Radical Student Union, Vacaville Prison Project, Students for Economic and Racial Justice and East Bay Right to Life.

must be governed by "narrow, objective, and definite standards to guide the licensing authority" so that content neutrality can be assured. Shuttlesworth v. Birmingham (1969) 394, U.S. 147, 150151. A sheme governing forum access "that contains no standards whatsoever - let alone standards designed to be 'narrow, definits and objective' - to guide . . . officials in their decisions" is constitutionally infirm. Dillon v. Municipal Court (1971) 4 Cal.3d 860, 870; see also Lakewood v. Plain Dealer (1988) 486 U.S. 750, 755-757; Staub v. Baxley (1957) 355 U.S. 313, 322, 325; Gaudiya Vaishnava Society v. San Francisco (9th Cir. 1990) 900 F.2d 1369, 1375. "Such discretion grants officials the power to discriminate . . . ." Gaudiya Vaishnava Society, supra, at p. 1375, quoting from an earlier case.

Because a standardless forum access policy poses a severe threat of potential lack of content-neutrality, a party challenging

such a scheme "need only show" the standardless nature of the policy. Weapons Labs Conversion Project, supra, 154 Cal.App.3d at p. 1171. "This is enough to establish a violation of the principle of equal protection, since unfettered 'discretion has the potential for becoming a means of suppressing a particular point of view.' . . ." Ibid.

ASUC's policies with respect to funding political and ideological advocacy groups present a textbook case of such an invalid standardless scheme. No "narrow, definite, and objective" criteria exist requiring ASUC to fund any given group or cause, or give such group or cause any particular amount of money. ASUC has no policy requiring it to give every group that meets certain fixed criteria (e.g. registration with the University as a campus organization) some set amount of money (e.g. $200 per group), or requiring it to apportion funds among groups meeting such fixed criteria on some

objective basis such a funding proportional to a group's membership (e.g. $5 per member) or the amount of voluntary contributions raised by the group (e.g. $1 from ASUC for every $1 raised voluntarily). On the contrary, the ASUC Finance Committee and ASUC Senate have absolute and unbridled discretion to determine which groups will be funded and the levels of funding allocated to each. RT 618-620, 622-624. "No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power . . . . It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here." Niemotko v. Maryland (1951) 340 U.S. 268, 272. Such standardless policies invite viewpoint-based discrimination by ASUC in alloting funds to political and ideological advocacy groups.

ASUC's use of mandatory fee funds to support such groups, thus, is in no way com-

parable to the "content-neutral subsidies" (PG&E, supra, 475 U.S. at pp. 14-15) upheld in Buckley v. Valeo (1976) 424 U.S. 1 and Regan v. Taxation With Representation (1983) 461 U.S. 540. In the latter two cases, unlike the instant one, the subsidies were allocated in accordance with narrow, definite objective criteria. Cf. Buckley, supra (federal statute gives matching funds to all candidates for President meeting statutory criteria, and equal amounts to all parties meeting statutory definition of "major" parties for general election campaign0; Regan, supra (subsidy to vetrans groups solely in form of tax deduction for contributions, so that amount of subsidy determined by amount of voluntary contributions).

Any "State/ / interest in promoting speech by making a variety of views available to /students/" is "not furthered by a/ / /mandatory ASUC fee/ that is not con-

tent neutral. . . . It follows that the /mandatory ASUC fee/ is not a narrowly tailored means of furthering this interest." PG&E, supra, 475 U.S. at p.20.

The lack of content neutrality makes the instant case wholly dissimilar from some (mostly pre-Abood/pre-Keller) authorities upholding use of mandatory student fees to fund student newspapers and other fora that were apparently content-neutral.

II. ASUC HAS NO CONSTITUTIONAL RIGHT TO HAVE ITS VIEWS SUBSIDIZED BY MANDATORY FEE FUNDS

Petitioners appear to suggest that restrictions on use of mandatory student fees to assure political and ideological advocacy is not funded by such fees will somehow abrige the First Amendment rights of ASUC and funded groups.

This Court has uniformly rejected similar claims. It is well settled that the constitutional right of free speech

does not include a right to have one's speech subsidized by the government or others. Cammarano v. U.S. (1959) 358 U.S. 498, 513, 515; Regan, supra, 461 U.S. 540.

As Justice Douglas noted in Cammarano, supra, at p. 515: "/The/ notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State . . . runs counter to our decisions . . ., and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights."

To require ASUC to fund political and ideological advocacy from voluntarily-contributed funds or profits from its commercial enterprises works no infringement of the rights of ASUC or funded groups.

CONCLUSION

The petition for certiorari should be denied.

DATED: 8/16/93

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